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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, individually and on behalf of its students; MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY; JENNIFER S. SMITH and VICTOR E. VOUGA,

Petitioners,

vs.

T. H. BELL, Secretary of U.S. Department of Education; HARRY M. SINGLETON, Acting Assistant Secretary for Civil Rights, U.S. Department of Education,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Can a College which concededly operates no program or activity receiving federal assistance be made subject to Title IX of the Education Amendments of 1972 solely because some of its students receive federal grants limited to educational purposes?

2. Is the College's entire operations subject to Title IX regulation where the College itself receives no federal financial assistance, but where some of its students participate in direct student assistance programs over which the College can exercise no selection or control?

3. May the Department of Education terminate direct grants to students, without a finding of discrimination in any program which receives federal financial assistance, solely because their College refused to sign an Assurance of Compliance?

4. Does the application of Title IX regulation to the College and its students violate First Amendment rights to academic freedom and association?

PARTIES

The caption of the case in this Court contains the names of all parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals (Reproduced at Appendix (hereafter "A") A 1) is reported at 687 F.2d 648 (3d Cir. 1982). The opinion of the District Court (A 45) is reported at 500 F.Supp. 253 (W.D. Pa. 1980). The decision of the Administrative Law Judge (A 89) is not reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on August 12, 1982. (A 99). Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The following constitutional provisions, statutes and regulations, reproduced in relevant part in the Appendix, are involved in this petition:

1. The First Amendment to the United States Constitution (A 101).
2. Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a). (A 101).
3. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1682. (A 105).
4. The regulations of the Department of Education, 34 C.F.R. Part 106.[1] (A 106).

STATEMENT OF THE CASE

This case presents to this Court a situation in which the Department of Education is terminating the financial assistance of students who attend Grove City College, claiming the authority to do so under Title IX of the Education Amendments of 1972, whose purpose is to outlaw sex discrimination. Grove City College, it is conceded, does not discriminate. Grove City College also has no control over the federal aid programs in which its students participate. Those students who attend the College will lose their Federal financial assistance solely because the College will not execute an Assurance of Compliance with Title IX.

Petitioner Grove City College ("College") is an independent, co-educational liberal arts college located in western Pennsylvania. Since its founding in 1876, the College has refused consistently all forms of government assistance, whether federal, state or local. The decision to forego participation in government construction, research, and assistance programs is

[1] When this lawsuit commenced, these regulations were administered by the Department of Health, Education and Welfare (HEW) and were codified at 45 C.F.R. Part 86. They were recodified at 34 C.F.R. Part 106 in virtually identical form on May 9, 1980, in connection with the establishment of the Department of Education. 45 F.R. 30802, 30962-3 (1980).

premised on the College's belief in institutional self-sufficiency and autonomy. In addition, the College believes that its commitment to deliver high quality education at minimal cost would be significantly impaired if it were obligated to comply with the expensive and burdensome regulation which invariably follows government funding.[2] This decision is not based on any disagreement with Title IX's non-discrimination requirements. To the contrary, even before Title IX was enacted, the College claimed no right to discriminate and maintained a policy of non-discrimination.[3]

In July 1976, the Department[4] requested that the College execute the agency's Form 639A (A 124), an Assurance of Compliance in the form required by 45 C.F.R. §86.4.[5] The Assurance required that the College acknowledge that it was operating federally funded educational programs and was therefore subject to all regulations implementing Title IX. *See* 45 C.F.R. Part 86.

[2]Despite endowment income of less than $250 per student and notwithstanding the lack of any government funding, the College's current tuition, fees, room and board charges for its 2200 students average less than $4350 per student per academic year, significantly less than other independent institutions of its quality. The College's operating practices are different than other institutions. Making its operations as efficient as possible, it has only 17 administrators and a Board of Trustees very active in the operation of the College. It is a living example of diversity in American higher education, proving that an excellent education can be obtained at less cost than prevailing wisdom indicates.

[3]The College maintains that discrimination on the basis of race or sex is morally repugnant to its principles, a belief it has held voluntarily long before the advent of the federal nondiscrimination laws. In addition, its admissions practices and treatment of students are presently regulated by Pennsylvania law. *See* 17 *Pa. Cons. Stat. Ann.* § 5001 *et seq.* (Purdon 1981).

[4]Unless the context demands greater specificity, both HEW and its successor, the Department of Education, will be referred to as "the Department." In the interests of consistency, the regulations at issue will be cited as 45 C.F.R. The regulations' section numbers remain the same, however, whether codified at 34 or 45 C.F.R.

[5]Now required by 34 C.F.R. §106.4

The College told the Department that, as a matter of principle, it had consistently refused to accept assistance from the government and that it did not operate any programs or activities which received federal financial assistance. In addition, the College emphasized that it did not discriminate and did not intend to do so. Therefore the College stated that it would not execute the Assurance, especially since the Assurance by its terms imposed institution-wide regulation over all the College's activities.

The Department contended that executing the Assurance was necessary because a number of the College's students received Basic Educational Opportunity Grants (BEOGs)[6] or Guaranteed Student Loans (GSLs).[7] Despite the fact that the assistance was paid by the government or private lenders directly to the students, the Department maintained that funds from these sources might be paid eventually to the College.[8] Thus, alleged the Department, the College was a "recipient" of federal financial assistance as that term was defined in 45 C.F.R. 86.2(h), and, therefore, was subject to all of the Department's Title IX regulations. Faced with the College's refusal to sign the Assurance, the Department began proceedings to

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[6]20 U.S.C. §1070a.

[7]20 U.S.C. §§ 1071 *et seq.*

[8]The College's sole function with respect to the BEOG and GSL programs is to state its educational costs and to certify that the students applying for such aid are matriculating at the College. The grants and loans are made directly to the students by the government or private lending institutions which exercise complete control over the selection process. The College has neither control over, nor knowledge of, the use of the funds under either program. The funds are not required to be used to pay College charges, but may be used for any educational purpose. This broad condition, for example, allows the student to spend BEOG funds with private vendors for

Footnote continued on next page—

declare the College, and thereby its students, ineligible to receive GSLs and BEOGs.[9]

Following a hearing, an HEW Administrative Law Judge found that the College was not in compliance with the Title IX regulations solely because it refused to execute the Assurance. Concluding that he had no power to change the regulations, the ALJ therefore held that students attending the College were ineligible to receive BEOGs or GSLs and ordered termination of their grants and loans. In *re Grove City College*, docket No. A-22 (September 15, 1978). (A 89). Significantly, the Administrative Law Judge also found that:

> There was not the slightest hint of any failure to comply with Title IX save the refusal to submit an executed Assurance of Compliance with Title IX. This refusal is obviously a matter of conscience and belief. (A 94).

The Administrative Law Judge's order became final on October 14, 1978 (45 C.F.R. §81.104). On November 29, 1978, the College and several of its students commenced suit in the United States District Court for the Western District of Penn-

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—*Footnote continued from preceding page*

books, off-campus housing, travel, child care, and miscellaneous personal expenses. See 34 C.F.R. § 690.51 (1981). The implication that BEOG funds automatically flow undiverted from the federal treasury to the College must therefore be rejected. The College has chosen not to accept students who wish to participate in other federally funded student assistance programs where the federal monies are given to the institution as a fund. In these programs, the institution selects eligible recipients and determines the amount of grants or loans. See BEOG (Regular Disbursement System), 34 C.F.R. §§ 690.71-690.85; Supplemental Educational Opportunity Grant Program, 34 C.F.R. Part 676; National Direct Student Loan Program, 34 C.F.R. Part 674; College Work-Study program, 34 C.F.R. Part 675.

[9]In the administrative proceedings, only the College was named as a respondent.

sylvania seeking judicial review of the administrative determination pursuant to 20 U.S.C. §1682 and 5 U.S.C. §701 *et seq.* In an amended opinion on June 26, 1980 (A 45; 500 F.Supp. 253), the district court granted plaintiffs' motion for summary judgment, holding that the Department could not terminate federal assistance to Grove City students because the College refused to sign the Assurance of Compliance.

Although the district court accepted the Department's argument that BEOGs and GSLs constituted "Federal financial assistance" within the meaning of Title IX, it nonetheless upheld the College's position in other respects. First, the court held that the Department could not terminate GSLs because Section 902 of Title IX (20 U.S.C. §1682) precludes any Title IX enforcement authority with respect to "a contract of insurance or guarantee". (A 105). Second, the district court held that the College was not required to sign the Assurance of Compliance because it required agreement with invalid regulations, as Subpart E of the Department's regulations had then been held to be invalid by a number of courts. (A 76-77). Alternatively, the district court held that termination of assistance to students based solely upon the College's refusal to sign the Assurance of Compliance was unlawful because Section 902 of Title IX permitted termination only upon an actual finding of sex discrimination. (A 79-84). Finally, the district court held that termination was impermissible absent a due process hearing for the students. (A 78-79).

The Department appealed from the district court's decision, and thereafter, the College cross-appealed from one part of the decision. The Department appealed the failure of the district court to uphold termination of assistance to the College's students.[10] The College argued that the district court erred in

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[10]During the appeal the Department withdrew its claim that GSLs are not within the exclusion of Section 902 for contracts of insurance or guaranty. Termination of GSLs to the College's students is therefore not at issue in this petition. *See* A 9, n.10.

finding it to be a recipient of Federal financial assistance within the meaning of Title IX.

In an opinion dated August 12, 1982, the Court of Appeals for the Third Circuit upheld the District Court on the recipient issue and reversed it in all other respects. Relying substantially on post-enactment legislative history, the Court of Appeals held that receipt by students of BEOGs rendered the College subject to Title IX as a "recipient" of Federal financial assistance. (A 10-20). Moreover, in answering the College's argument that upholding Title IX jurisdiction was incompatible with the explicit program-specific limitation contained in Title IX, the Court of Appeals, contrary to numerous other courts, held that the receipt by students of federal grants rendered the entire College subject to Title IX regulation. In doing so, the Circuit Court specifically held that "program or activity" as that phrase is used in Title IX encompassed the entire educational institution. (A 23-31). The Court of Appeals additionally held that the Department may lawfully terminate assistance to students solely because the College refused to sign an Assurance of Compliance, notwithstanding lack of any discrimination. (A 34-37). Finally, it held that no individual due process hearings were necessary before terminating assistance to students. (A 38-39).

REASONS FOR GRANTING THE PETITION

A. *The Decision of the Court Below Conflicts With Applicable Decisions of This Court and With Decisions of Other Courts of Appeal Interpreting Title IX of the Education Amendments of 1972.*

This case presents a simple issue: Did Congress intend to subject to institution-wide Title IX regulation an independent college which refuses any Federal assistance, but which enrolls students who receive Basic Educational Opportunity Grants

directly from the government without any selection or intervention by the college? The Third Circuit answered in the affirmative, holding that, "Where the federal government furnishes indirect or non-earmarked aid to an institution, it is apparent to us that the institution itself must be the "program." (A 31). Accordingly, when any of its students receives BEOGs, the entire institution is subject to Title IX regulation. Furthermore, said the Third Circuit, a college's failure to acknowledge that it is subject to such regulation requires termination of all federal aid to students. The Third Circuit holding is contrary to this Court's decision in *North Haven Board of Education v. Bell*, ___ U.S. ___, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982), (hereafter "North Haven"), as well as with decisions in the other Courts of Appeals.

Section 901(a) of Title IX states in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. §1681(a).

Section 902 of Title IX specifies the remedy for violation of Section 901's non-discrimination requirement in the same program-specific terms. Any violation of Title IX requires termination of assistance to the "program or part thereof" found to be discriminatory. 20 U.S.C. §1682. By this clear programmatic language, Congress mandated that receipt of federal assistance be denied if the educational institution operating a program or activity discriminates in the program or activity receiving federal assistance. As a condition precedent to becoming a covered recipient of "Federal financial assistance," however, the institution must operate an "education program or activity" which receives the assistance. *Receipt* is the statutory touchstone. A fair reading of the statute

indicates that it is not enough that the educational institution incidentally benefits from its *students'* receipt of federal aid. Benefit does not equal receipt.

As its conscious use of this program-specific language in Sections 901 and 902 demonstrates, Congress did not intend that a college which does not operate any program or activity receiving Federal financial assistance, and whose only connection to federal aid is its admission of students who receive federal grants, would be subject to Title IX regulation. Despite the College's principled refusal of any federal funding, however, the Court of Appeals concluded that all the College's programs and activities were subject to Title IX solely because some of its students participate in student aid programs.[11] In finding that the entire operation of the College constituted its "program," the Third Circuit misinterpreted the program-specific thrust of Title IX, as stated in this Court's opinion in *North Haven*.

In North Haven, this Court held that the Department has jurisdiction under Title IX to consider compiaints of employment discrimination in programs or activities receiving Federal financial assistance. In doing so, however, this Court rejected the Second Circuit's assertion that the regulatory authority of the Department was institution-wide. The Second Circuit had stated that the program-specific restriction on the termination power was not a restriction on the Department's overall

[11]The Third Circuit found it necessary to reach this conclusion once it determined that the direct grants to students brought the College within the jurisdiction of Title IX. At that point, the Court believed that the only way to comply with Title IX's program-specific command was to hold the entire educational institution to be a "program." *See* A 31. The incompatibility of this holding with *North Haven's* program-specificity holding underscores that in the case of student assistance programs where the institution itself has no involvement or control in the selection of recipients or the amount of their grants (ie, the BEOG alternate disbursement system), Congress did not intend that Title IX regulation would apply. *See* Note, "Title VI, Title IX, and the Private University: Defining 'Recipient' and 'Program or Part Thereof,'" 78 *Mich. L. Rev.* 608 (1980).

regulatory power, which the Second Circuit held could be exercised in an institution-wide manner. *See* 629 F.2d at 785. Overturning the Second Circuit's holding, this Court noted that Congress had rejected an institutional approach in favor of a prohibition against discrimination in programs receiving assistance. 102 S.Ct. at 1926. It then concluded:

> [A]n agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§901 and 902. (20 U.S.C. §§1681, 1682). *Id.*

The Third Circuit disregarded this holding of *North Haven* and held instead that any federal aid to students attending an educational institution would subject the whole institution to Title IX regulation. (A 31). The Third Circuit attempted to reconcile its decision with *North Haven* on the basis that *North Haven* had implicitly adopted an institutional approach to Title IX regulation. (A 24). This Court in *North Haven* did leave to a later case the precise meaning of the word "program", 102 S.Ct. at 1927, but unambiguously commanded that Title IX be interpreted by the Department only in a program-specific manner. The Court condemned the institution-wide approach which the Second Circuit would have permitted, and which the Third Circuit has now adopted. *See* 102 S.Ct. at 1926.

On the specific issue of the effect of student assistance programs, the Third Circuit holding in this case conflicts with other courts of appeal and numerous district courts. It is now also regarded by the Department itself as erroneous.

In *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 1976, 72 L.Ed.2d 444 (1981), a student brought suit under Section 901 of Title IX claiming sex discrimination in grading practices at Harvard Law School. The only federal aid program alleged to exist at Harvard was a student work/study program. Plaintiff argued that Harvard's "receipt" of federal funds

through participation in the work/study program opened its grading practices to challenge under Title IX. Equating assistance to the work/study "program" with assistance to the entire educational institution was crucial to Plaintiff's argument.

Unlike the Third Circuit in this case, the First Circuit rejected this equation. Initially, the First Circuit noted that although "education program or activity" is not defined in Title IX, "educational institution" is, thus leading to the conclusion that the two are not the same. 663 F.2d at 338. It then noted that Senator Bayh's initial Title IX proposal was institution-wide in scope, but that Congress rejected that approach in favor of the programmatic approach. 663 F.2d at 338-39, n.1. Plaintiff did not claim discrimination in the work/study program, where Title IX was properly applicable. The *Rice* court therefore concluded that the claim that Title IX was applicable to Harvard's grading practices could not be upheld.

Thus, the First Circuit conflicts with the Third Circuit's conclusion that "program or activity" should be given an institutional interpretation. The Third Circuit recognized this conflict but explicitly refused to follow *Rice*. (A 30, n.27.)

The Third Circuit in this case also rejected the reasoning and holding of *University of Richmond v. Bell*, 543 F.Supp. 321 (E.D. Va. 1982). The direct conflict between the Third Circuit and the district court in *Richmond* merits this Court's attention. The Department has refused to appeal the *Richmond* decision, concluding that the District Court's decision was "analytically and legally sound", even read in light of the Third Circuit decision in this case. *See* Letter of Assistant Attorney General Reynolds to Clarence Pendleton, Jr., September 16, 1982. (A 134).

Richmond considered whether the Department could investigate compliance in the University's athletic program where

the only types of federal assistance involved were general student assistance programs[12] and a $1,900 library grant. Following the approach ratified by the Third Circuit in *Grove City*, the Department maintained that the University had "received", either directly or indirectly, "Federal financial assistance" which benefited its programs or activities. *See* 543 F.Supp. at 323-4, n.5.[13] Completely rejecting this approach, the district court held the Department was engaged in an *ultra vires* attempt to legislate the institutional approach to Title IX regulation which Congress had rejected:

> In essence, the [Education Department's] "benefits" and "infection" theories are but theories, or arguments, that Congress should not have rejected the initial institutional approach introduced by Senator Bayh. However, Congress did reject that approach and that should have been the end of it. 543 F.Supp. at 330.

The *Richmond* court similarly rejected the Department's interpretation of assistance to students as the equivalent of assistance to the institution. 543 F.Supp. at 330. The Third Circuit specifically equated the two, upholding the Department's regulation [45 C.F.R. 86.2(g)(1)(ii).] (A 15). In contrast, the *Richmond* court likened the relationship between student assistance and the education institution's receipt of tuition as a fee for services rendered, stating:

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[12]These included National Direct Student Loans, Supplemental Educational Opportunity Grants, the College Work/Study Programs, and BEOGs. See 543 F.Supp. at 323.

[13]The assertion of an identical position by the Department is what led Grove City College to refuse to sign the Assurance of Compliance, since to do so would have conceded institution-wide coverage of all of its programs or activities, despite the fact that it did not itself receive any assistance. *See* the Department's fact sheet accompanying the Title IX regulations, which unequivocably state this position:

Footnote continued on next page—

> The Court simply will not countenance the [Education Department's] attempt to bootstrap itself through its regulations to make, by necessary implication, all programs and activities of a private university subject to its control when . . . students themselves receive what it determines to be "Federal Financial assistance." 543 F.Supp. at 330-31.

The government has recognized the conflict between *Grove City* and *Richmond* and has concluded that *Richmond* represents the correct analysis of Title IX, and thus, should not be appealed. (A 136).

There is another case awaiting decision in the Sixth Circuit Court of Appeals which also involves the application of Title IX to student assistance programs. *Hillsdale College v. Department of Education, et al.*, No. 80-3207 (argued December 7, 1981). As in *Grove City*, the Department in *Hillsdale* ordered termination of direct assistance to Hillsdale students because Hillsdale refused to sign an Assurance of Compliance, despite the fact that Hillsdale itself received no federal aid. Hillsdale petitioned directly to the Circuit Court for review of the Department's action. The Sixth Circuit is the same Circuit which decided *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979), in which the

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—*Footnote continued from preceding page*

> [T]he final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives federal funds for any of those programs.

HEW Fact Sheet Accompanying the Final Title IX Regulations (1975). *Accord, Sex Discrimination Regulations: Hearings before the Subcomm. on Post-Secondary Education of the Comm. on Education and Labor, House of Representatives, 94th Cong., First Sess. (1975)*, at 438 (hereinafter *"Sex Discrimination Hearings"*) (testimony of HEW Secretary Weinberger); Letter of HEW Secretary Weinberger to Hon. James G. O'Hara, Chairman, House Subcommittee on Post-secondary Education, July 2, 1975, reprinted in *Sex Discrimination Hearings*, at 488.

court of appeals outlined the program-specific limitations of Title IX:

> The concern of this particular statute (Title IX) is not with all discrimination against persons in any way connected with educational institutions which receive federal funding. Rather, it reaches only those types of disparate treatment which manifest themselves in exclusion from, denial of benefits of, or otherwise result in discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance . . . ." Unless the discrimination relates to a program or activity which receives federal funding, it is not prohibited by §1681.

600 F.2d at 584. Although *Romeo's* holding regarding Subpart E of the Title IX regulations is no longer valid in light of *North Haven*, this Court in *North Haven* fully endorsed the *Romeo* language quoted above. The Sixth Circuit is therefore likely to reconfirm its belief that Title IX is program specific.[14]

The Third Circuit's construction of "program or activity" also conflicts with the Fifth Circuit's interpretation of identical programmatic language under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Compare A 31 with *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F.2d 1068, 1077 (5th Cir. 1969) (hereafter *"Finch"*). At issue in *Finch* was the Department's attempted termination of all federal assistance to an entire school district without regard to the program-specific termination provisions of Title VI. The Department argued in *Finch* that the term "program" as used in Title VI was meant to encompass an entire school program. Relying on the legislative history of Title VI, the *Finch* court rejected this broad interpretation and held instead that the individual grant statutes at issue constituted the "program or activity" as that phrase is used in Title VI. Title IX, whose

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[14]The Third Circuit expressed the opinion that neither *Romeo* nor the related line of cases which considered the Department's Subpart E employment regulations had any validity after *North Haven* and expressly refused to follow their program-specificity analysis. A 30, at n. 27.

programmatic language is identical to that in Title VI, was modeled on that statute. *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979). The Third Circuit rejected the more limited definition of program set out in *Finch*, despite the fact that *Finch* was cited approvingly in *North Haven*. *See* 102 S.Ct. at 1926.

Numerous other district courts similarly disagree with the Third Circuit's endorsement of the institutional approach to Title IX regulation. *See, Bennett et al. v. West Texas State University*, 525 F.Supp. 77 (N.D. Tex. 1981), *appeal pending*, No. 81-1398 (5th Cir.) (No Title IX jurisdiction over athletics program not receiving federal financial assistance.); *Othen v. Ann Arbor School Board*, 507 F.Supp. 1376 (E.D. Mich. 1981), *appeal pending*, No. 81-1259 (6th Cir.) (No Title IX jurisdiction over athletics program not receiving federal financial assistance).

B. *This Case Raises Significant Constitutional and Statutory Questions Concerning the Government's Power to Regulate the Affairs of Independent Colleges.*

This case raises substantial issues regarding the scope of government authority under Title IX. It is important not only to educational institutions like the College, which have steadfastly refused any Federal financial assistance, but to virtually every educational institution in the United States. It also raises significant questions about the limitations on First Amendment rights of association and academic freedom to which the College and its students are entitled.[15]

In the hundreds of independent colleges and universities which exist in this country, diversity has long been an acknowledged strength. Each institution solves problems in its

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[15] *Cf.* Note, "Academic Freedom and Federal Regulation of University Hiring," 92 *Harv. L. Rev.* 879, 891-897 (1979)

own manner, each is a center of innovation and experiment, and each has its own commitment to cultural, educational, and moral values. This diversity itself is so important that it is recognized as meriting constitutional protection. *See University of California Regents v. Bakke*, 438 U.S. 265, 311-315 (1978) (Powell, J.). The necessity of preserving this valued diversity has been also long recognized by Congress. Representative Green, the house sponsor of Title IX, stated during the debates on Title IX:

> I think we ought to respect the autonomy of the institution and let the institutions determine their priorities and needs. The Federal government has no business saying that if you do not do what we have decided is important — you do not get any funds. I say if we follow this course, we will have more and more Federal control, which is what I want to avoid.

117 Cong. Rec. 37785 (1971). Representative Green's comment underscores the Congressional philosophy which has guided aid to American higher education. Congress feared that general assistance would result in control. Remembering the adage that he who pays the piper calls the tune, historically Congress has aided higher education either through programmatic grants and loans, or through direct assistance to students who can then exercise their freedom to choose the educational institution most suitable to them.

Title IX's program-specific limitation must be understood in the foregoing context; regulation is permissible in those programs receiving federal aid, but is impermissible where a program receives no assistance.[16] Congress did not intend that assistance given directly to students without intervention or selection by the educational institution would subject the entire institution to control. Because student assistance programs are so widespread, to find otherwise would nullify Title IX's

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[16]This would not preclude termination of assistance where discrimination in a non-funded program "infects" a funded program. *See Finch*, 414 F.2d at 1078; *Richmond*, 543 F.Supp. at 329-330; *Rice*, 663 F.2d at 339, n.2.

program-specific directive for virtually every educational institution in the country.

The Third Circuit's expansive institutional approach already has been applied in several cases arising either under Title IX or under other statutes with the same programmatic language.

In *Haffer v. Temple University*, 524 F.Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982), *pet. for cert. pending*, another panel of the Third Circuit considered whether Title IX should be applied to an athletics program which itself received no Federal financial assistance. Holding itself bound by the decision in *Grove City College*, the *Haffer* court held that the receipt by some Temple students of BEOG funds subjected all Temple's programs and activities, including the athletics program at issue, to Title IX regulation.

In *Le Strange v. Consolidated Rail Corporation*, No. 81-2943 (3d Cir. September 1, 1982), the Court of Appeals held that Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794) applied to employment practices. Concurring in the judgment, Circuit Judge Adams stated that the decision in *Grove City* compelled a conclusion that employment practices were covered under Section 504 even if federal funds were not slated for employment purposes. *See also, Pittsburgh Federation of Teachers, Local 400 v. Langer*, No. 81-1546 (W.D. Pa. August 31, 1982) (entire operation of school district may be "program" for purposes of Section 504).[17]

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[17]These decisions in the Third Circuit illustrate the conflicting approaches taken by other courts examining indirect assistance in the context of program-specific statutory language. *See Disabled in Action v. Mayor and City Council of Baltimore*, No. 81-1846/1896 (4th Cir. August 9, 1982) (Baseball club which leases city-owned stadium receiving federal financial assistance is not a "recipient" itself under Section 504 of the Rehabilitation Act of 1973, despite the fact that it enjoys indirectly the benefits of federal assistance to the stadium); *Angel v. Pan American World Airways*, 519 F. Supp. 1173 (D.D.C. 1981) (Despite fact that airline was beneficiary of federal financial assistance to airport, it was not a program or activity receiving federal assistance under Section 504).

Uncertainty as to the meaning of Title IX's program-specificity language, therefore, requires that this Court eliminate the inconsistencies among the courts of appeals and clarify the intended scope of permissible regulation under Title IX.

C. *It is Fundamentally Unfair to Permit the Government to Subject Colleges in the Third Circuit to a Different Rule of Law From That Prevailing in Other Circuits.*

The government has stated that it believes the rule of law adopted by the Third Circuit in this case is wrong. In a letter explaining why the government had decided not to appeal the *Richmond* decision, Mr. William Bradford Reynolds, Assistant Attorney General in charge of the Civil Rights Division, explained that the government no longer supported the expansive reading it had once advocated in *Richmond* and *Grove City College:*

> "The position advanced by the then director of DOEd's Office of Civil Rights . . . was that receipt by Richmond students by even a single dollar of federal funds is sufficient to subject all of the University's programs and activities to Title IX scrutiny — even those programs and activities that receive no federal funds . . . ."
>
> In light of the clear language of Sections 901 and 902, the accompanying legislative history, and the Supreme Court's recent pronouncement of the intended scope of Title IX coverage, we found [the Richmond opinion] to be both analytically and legally sound. Its conclusion that only those university programs and activities shown to be recipients of federal funds are within the reach of Title IX is fully consistent with the better reasoned judicial precedents in the area. See *Rice v. President and Fellows of Harvard College,* 663 F.2d 336 (1st Cir. 1981); *Bennett v. West Texas State University,* No. 280-0073-f (N.B. Tex., July 27, 1981); *Othen v. Ann Arbor School Board,* 507 F.Supp. 1376 (E.D. Mich. 1981). (A 135-136)."

After acknowledging that the Third Circuit in *Grove City* had adopted the position previously urged by the government, Assistant Attorney General Reynolds indicated that it was now the government's view that Congress had not intended so expansive an interpretation of "program or activity". (A 136).

Thus, the government will no longer contend that an entire academic institution is subject to Title IX simply because some of its students receive BEOGs. Refusing to grant this petition and thereby leaving intact the Third Circuit's judgment will create a fundamentally unfair result. Colleges in the Third Circuit that enroll students who receive BEOGs will be subject to institution-wide Title IX coverage while colleges in other circuits will not be. Such a result is intolerable.

To avoid such arbitrary injustice, this Court should grant the petition and set the case for argument.

CONCLUSION

What the Third Circuit endorsed in this case essentially turns the pertinent Statute upside down. The obvious and stated purpose of Section 901(a), 20 U.S.C. §1681(a), is to outlaw sex discrimination in "any education program or activity receiving Federal financial assistance." Yet the undeniable effect of the Court of Appeals' decision is to terminate assistance without regard to whether such discrimination exists or has ever existed.

Grove City College has not discriminated, yet students who attend the College will be prevented from participating in aid programs designed especially for them. This situation is one which deserves review by this Court. It is therefore respectfully urged that this Court grant the petition.

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Respectfully submitted,

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